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No. 02-1191

In the Supreme Court of the United States

CARLO DONATO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a court of appeals may adopt a rule that resentencing on remand is presumptively limited, not presumptively de novo, when the court of appeals affirms the conviction and remands for correction of a specific sentencing error.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 306 F.3d 1217.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 2002. On December 13, 2002, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including February 6, 2003, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of one count of conspiracy to commit carjacking, in violation of 18 U.S.C. 371; six counts of carjacking, in violation of 18 U.S.C. 2119; and six counts of using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). He was sentenced to 119 years' imprisonment and a fine of $175,000, and was ordered to pay $295,807.25 restitution. The court of appeals affirmed. After the district court denied petitioner's motion under 28 U.S.C. 2255 to set aside his conviction and sentence, the court of appeals found that there may have been a double-counting error in the calculation of petitioner's sentence and remanded to the district court to consider that question. On remand, the district court corrected the double-counting error, reduced petitioner's prison term to 115 years, and reimposed the same fine and restitution. The court of appeals vacated the fine, remanded for reconsideration of the fine, and in other respects affirmed petitioner's sentence.

1. In separate incidents in 1993 and 1994, petitioner carjacked three Mercedes Benz and three BMW vehicles, on each occasion threatening his victim with a gun. Pet. App. 4a. A jury found him guilty of one count of conspiracy, six counts of carjacking, and six counts of using a firearm during and in relation to a crime of violence. *Ibid.* Petitioner was sentenced to 168 months' (14 years') imprisonment on the conspiracy and carjacking counts, five years' imprisonment on the first firearm count, and 20 years' imprisonment on each of the other firearm counts. *Ibid.* The district court ordered that the sentences run consecutively, for a total

term of imprisonment of 119 years. *Id.* at 4a-5a. The district court also imposed a fine of $175,000 and ordered restitution in the amount of $295,807.25. *Id.* at 5a. The court of appeals affirmed in an unpublished opinion. *Id.* at 34a-37a (112 F.3d 506 (Table)).

2. In March 1998, petitioner filed a pro se motion to set aside his conviction and sentence under 28 U.S.C. 2255. Pet. App. 5a, 29a. The district court denied the motion, but granted a certificate of appealability. *Ibid.* In a summary order, the court of appeals rejected all of petitioner's claims but one. *Id.* at 28a-33a (208 F.3d 202 (Table)). The one claim that the court did not reject was a claim of double counting: it concluded that there may have been error if the district court increased petitioner's offense level for possession of a firearm under Sentencing Guidelines § 2B3.1(b)(2)(C) and also sentenced petitioner to a consecutive term of imprisonment for possession of the same firearm under 18 U.S.C. 924(c). Pet. App. 32a-33a. The court of appeals therefore "remand[ed] to the district court for resentencing in light of this order, without prejudice to the government submitting an argument to the district court explaining why this was not double-counting." *Id.* at 33a.

3. On remand, the government conceded, and the district court found, that there had in fact been double counting of petitioner's possession of a firearm. Pet. App. 6a. As a consequence, the court reduced petitioner's offense level and sentenced him to 120 months' (ten years') imprisonment for the conspiracy and carjacking crimes. *Id.* at 8a. When the consecutive 105 years' imprisonment for the firearm crimes were added, the resulting sentence was 115 years' imprisonment. *Ibid.* The court reimposed the fine of $175,000 and the restitution order of $295,807.25. *Ibid.* In resentencing

petitioner, the district court denied his motion for a downward departure based on post-conviction rehabilitation and rejected his claim that his sentence violated the rule of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000).

4. On appeal, petitioner challenged the amount of the fine; asserted that his sentence violated *Apprendi*, the Eighth Amendment, and Sentencing Guidelines § 2K2.4; and claimed that the district court had erred in failing to hold a hearing on whether he was competent to be resentenced, in failing to order a new Pre-Sentence Report (PSR), in failing to consider the requisite factors before ordering restitution and a fine, and in failing to consider petitioner's motion for a downward departure. Pet. App. 3a, 8a The court of appeals affirmed the new term of imprisonment, but vacated the fine, because it was outside the Guidelines range for the recalculated offense level, and remanded for reconsideration of the fine amount. *Id.* at 1a-27a.

a. The threshold question for the court of appeals was whether any of petitioner's claims were barred by the branch of the "law of the case doctrine" known as the "mandate rule." Pet. App. 8a-9a. As the court explained, that rule "ordinarily forecloses relitigation of all issues previously waived by the defendant or decided by the appellate court." *Id.* at 9a. If, however, a case has been "remanded for *de novo* resentencing," a defendant "may raise in the district court and, if properly preserved there, on appeal to the court of appeals, issues that he or she had previously waived by failing to raise them." *Ibid.*

Interpreting the scope of its remand for resentencing in this case, the court of appeals held that, "because we identified a particular sentencing issue necessitating remand—whether [petitioner's] total offense level on the conspiracy count was improperly enhanced as a

result of 'double counting'—the remand was limited, not *de novo*." Pet. App. 9a. The court relied on *United States* v. *Stanley*, 54 F.3d 103 (2d Cir.), cert. denied, 516 U.S. 891 (1995), where a remand after identification of a specific sentencing error was held to be a limited remand, and distinguished *United States* v. *Atehortva*, 69 F.3d 679 (2d Cir. 1995), cert. denied, 517 U.S. 1249 (1996), where a remand after vacatur of certain counts of conviction was held to be a remand for resentencing de novo. Pet. App. 9a-14a. When one or more counts of conviction have been set aside, the court explained, de novo resentencing is appropriate, because "the constellation of offenses of conviction has been changed and the factual mosaic related to those offenses that the district court must consult to determine the appropriate sentence is likely altered." *Id.* at 13a. But "when the Court of Appeals upholds the underlying convictions but determines that a *sentence* has been erroneously imposed and remands to correct that error," resentencing is limited "absent explicit language in the mandate to the contrary." *Id.* at 14a. The court therefore held that petitioner "may not now raise arguments that he had an incentive and an opportunity to raise previously but did not raise, absent a cogent and compelling reason for permitting him to do so." *Id.* at 9a.

b. The court of appeals concluded that three of petitioner's claims—that the district court failed to consider the requisite factors before imposing a fine and restitution; that his sentence violated *Apprendi*; and that his offense level was improperly enhanced under Sentencing Guidelines § 2K2.4—were barred by the law of the case, because petitioner had failed to raise the claims previously despite having an opportunity and incentive to do so. Pet. App. 19a-21a. In addition to

finding it barred by the law of the case, the court rejected petitioner's *Apprendi* claim on the alternative ground that it was "utterly without merit," because "[t]he jury found all the elements of the crimes for which [petitioner] was convicted" and "his sentences do not exceed the statutory maximum for any of those crimes." *Id.* at 20a.

The court also concluded that four of petitioner's claims were *not* barred by the law of the case, because they arose from events occurring after the previous appeal. Pet. App. 21a-22a. It then considered the claims and rejected all but one. *Id.* at 22a-27a. The court held that the district court had an adequate basis for determining that petitioner was competent to be resentenced, and therefore was not obligated to hold a hearing; it held that the district court was not required to order a revised PSR, because petitioner had not requested one and was given a full opportunity to supplement the information in the original PSR; and it held that the district court had in fact considered petitioner's motion for a downward departure based on post-sentencing rehabilitation and had properly denied it, because such a departure is prohibited by Sentencing Guidelines § 5K2.19. Pet. App. 22a-27a. The court of appeals found the fourth claim that was not barred by the law of the case—the claim that the fine was outside the Guidelines range—to be meritorious. *Id.* at 27a. It therefore remanded "for the limited purpose of imposing a fine within the appropriate Guideline range, or imposing a fine above the Guideline range with appropriate explanation." *Ibid.*

ARGUMENT

Petitioner points to a disagreement among the courts of appeals on whether resentencing after a remand is

presumptively de novo or presumptively limited to correction of the errors found on appeal. Pet. 8-11. He urges the Court to grant certiorari and adopt the former rule. Pet. 13-21. Review by this Court is not warranted. Since Congress has authorized the courts of appeals to limit a remand in a sentencing case as the court deems appropriate, and has authorized each court of appeals to adopt local rules of practice, it is not clear that there is any need for this Court to adopt a uniform rule governing resentencing after remand. But even if there should be a single rule, this is not an appropriate case to establish one, because the result would be the same under the rule that petitioner advocates. This Court has repeatedly declined to grant review in cases presenting the question raised by petitioner,[1] and there is no reason for a different result here.

1. The statute governing sentencing appeals, 18 U.S.C. 3742, provides that, when a court of appeals finds a sentencing error, it must "remand the case for further sentencing proceedings with such instructions as the court considers appropriate." 18 U.S.C. 3742(f)(1), (f)(2)(A), and (f)(2)(B). This provision allocates to the courts of appeals the authority to determine whether resentencing after remand should be limited or de novo. See also *United States* v. *Santonelli*, 128 F.3d 1233, 1238 (8th Cir. 1997) ("an appeals court can * * * issu[e] limited remands [in] sentencing cases, leaving open for resolution only the issue found to be in error on the initial sentencing[,] * * * [or] it may remand for a complete redetermination of the

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[1] See *Hass* v. *United States*, 531 U.S. 812 (2000) (No. 99-1694); *Harris* v. *United States*, 525 U.S. 1148 (1999) (No. 98-6358); *Marmolejo* v. *United States*, 525 U.S. 1056 (1998) (No. 98-5372); *Whren* v. *United States*, 522 U.S. 1119 (1998) (No. 97-6220).

sentence"); *United States* v. *Polland*, 56 F.3d 776, 777 (7th Cir. 1995) ("[W]e have the power to limit a remand to specific issues or to order complete resentencing."). Although petitioner makes policy arguments (Pet. 13-21) as to why resentencing should presumptively be de novo, he does not suggest that there is any constitutional or statutory right to resentencing de novo, and he does not question Congress's authority to allow a court of appeals to decide whether resentencing should be de novo or limited. Nor does petitioner dispute that the rule adopted by the Second Circuit is only a "default rule" (Pet. App. 14a n.6) that permits a panel in a particular case to authorize de novo resentencing.

As petitioner correctly points out (Pet. 8-11), the courts of appeals have adopted different rules for determining what language in a remand order permits resentencing de novo or limits resentencing to the issues on which the court of appeals found error. Some circuits have adopted the rule that resentencing is presumptively de novo.[2] Other circuits have adopted the rule that resentencing is presumptively limited to

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[2] See *United States* v. *Faulks*, 201 F.3d 208, 210 (3d Cir. 2000); *United States* v. *Keifer*, 198 F.3d 798, 801 (10th Cir. 1999) ("Resentencing on remand is typically de novo, but an appellate court may limit the district court's discretion pursuant to the mandate rule."); *United States* v. *Stinson*, 97 F.3d 466, 469 (11th Cir. 1996), cert. denied, 519 U.S. 1137 (1997); *United States* v. *Jennings*, 83 F.3d 145, 151 ("Where the remand [order] does not limit the District Court's review, sentencing is to be *de novo*."), amended, 96 F.3d 799 (6th Cir.), cert. denied, 519 U.S. 975 (1996); *United States* v. *Ponce*, 51 F.3d 820, 826 (9th Cir. 1995) ("The propriety of the district court's de novo sentencings on remand * * * turns on whether 'the district court's authority was abridged by any express or implied limits in the remand order.'"); *United States* v. *Cornelius*, 968 F.2d 703, 705 (8th Cir. 1992).

correction of the errors found on appeal.[3] In this case, the court of appeals made clear that the rule in the Second Circuit is that no explicit authorization for de novo resentencing is required when one or more counts of conviction have been overturned on appeal, while explicit authorization for de novo resentencing is required when all convictions are affirmed but the court finds an error in sentencing.

It is not clear that there is any need for this Court to adopt a uniform rule for all the courts of appeals, because the rules concerning resentencing on remand might appropriately be viewed as local rules that can differ from circuit to circuit. So long as such local rules are reasonable, see *Thomas* v. *Arn*, 474 U.S. 140, 146-148 (1985), and consistent with Acts of Congress and the Federal Rules of Appellate Procedure, see Fed. R. App. P. 47(a), there is no requirement of "uniformity among the circuits in their approach to [these] rules." *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 251 n.24 (1993).[4]

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[3] See *United States* v. *Ticchiarelli*, 171 F.3d 24, 32 (1st Cir.) ("[U]pon a resentencing occasioned by a remand, unless the court of appeals [has expressly directed otherwise], the district court may consider only such new arguments or new facts as are made newly relevant by the court of appeals' decision—whether by the reasoning or by the result."), cert. denied, 528 U.S. 850 (1999); *United States* v. *Marmolejo*, 139 F.3d 528, 530-531 (5th Cir.), cert. denied, 525 U.S. 1056 (1998); *United States* v. *Whren*, 111 F.3d 956, 960 (D.C. Cir. 1997), cert. denied, 522 U.S. 1119 (1998); *United States* v. *Parker*, 101 F.3d 527, 528 (7th Cir. 1996).

[4] Two courts of appeals have suggested a connection between the court's rule concerning the scope of resentencing on remand and the provision of Federal Rule of Criminal Procedure 32 (currently Fed. R. Crim. P. 32(i)(1)(D)) that allows new claims to be raised at any time before the imposition of sentence "for good cause." See *United States* v. *McCoy*, 313 F.3d 561, 564-567 (D.C.

But even if there should be a uniform rule governing resentencing after a remand, this is not an appropriate case for the Court to establish one, because petitioner would not be entitled to relief even under the rule he proposes. Although the case was remanded for the limited purpose of correcting a double-counting error, petitioner raised additional claims at his resentencing: he sought a downward departure based on post-conviction rehabilitation and raised a claim under *Apprendi*. Pet. App. 7a. The district court rejected those claims, not because they were outside the scope of the remand, but because it found them to be without merit. *Ibid.* The court of appeals likewise concluded that the departure motion and *Apprendi* claim had no merit. *Id.* at 20a, 26a-27a. Petitioner has not identified any claim that he sought to raise at resentencing but the district court refused to consider. Cf. *United States* v. *Marmolego*, 139 F.3d 528, 530 (5th Cir.) (affirming where district court "refused to hear evidence" on new claim at resentencing after remand), cert. denied, 525 U.S. 1056 (1998); *United States* v. *Whren*, 111 F.3d 956, 958 (D.C. Cir. 1997) (affirming where district court "declined to consider" new claims at resentencing after remand), cert. denied, 522 U.S. 1119 (1998). Thus, even if the remand order in this case should have been viewed as authorizing resentencing de novo, that is precisely what petitioner received. And even if there are other claims that petitioner might have wished to raise at his resentencing, they could not have reduced

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Cir. 2002) (en banc); *United States* v. *Moore*, 83 F.3d 1231, 1235 (10th Cir. 1996). To the extent that a court of appeals considers its rule on the scope of resentencing to be compelled by the Federal Rules of Criminal Procedure, the rule cannot properly be viewed as a local rule of practice.

his sentence below the 105 years' imprisonment for his six firearms crimes. See 18 U.S.C. 924(c)(1) (Supp. IV 1992) (mandatory minimum sentence of five years for first offense and 20 years for each subsequent offense; sentences must run consecutively).

2. There are two additional reasons why the Court should not grant certiorari in this case to establish a uniform rule for resentencing after a remand. First, this case differs from the vast majority of the cases that apply a rule of either de novo or limited resentencing, because the remand here did not follow a direct appeal but an appeal from the denial of a motion under 28 U.S.C. 2255. In view of the "narrow limits" on the "grounds for collateral attack on final judgments" under Section 2255, *United States* v. *Addonizio*, 442 U.S. 178, 184-185 (1979), there is a substantial argument that any rule for resentencing after an appeal from an unsuccessful Section 2255 motion should be different from the rule for resentencing after a direct appeal. Second, on April 30, 2003, the President signed into law an Act that inserts a new subsection (g), entitled "Sentencing upon remand," in 18 U.S.C. 3742, the statute that governs sentencing appeals. Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, S. 151, 108th Cong., 1st Sess. § 401(e) (enacted). One or more of the courts of appeals may conclude that the new Section 3742(g) supersedes the existing rule concerning resentencing, either in whole or in part.[5]

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[5] The new subsection (g) provides that, if the court of appeals finds that there was a sentencing error, "[the] district court to which [the] case is remanded" must "resentence [the] defendant in accordance with section 3553"—which sets forth the factors to be considered in imposing sentence and requires that the Sentencing Guidelines ordinarily be applied—"and with such instructions as

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2003

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may have been given by the court of appeals." The new subsection (g) also provides that the only grounds for an upward or downward departure following such a remand are those specifically relied upon at the original sentencing and held by the court of appeals to be a permissible basis for departure.